COVID-19 COMES TO THE COLORADO SUPREME COURT

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ABSTRACT

In 2020, the COVID-19 pandemic ravaged communities across the United States—and Colorado was no exception. The state government acted quickly to respond to this ongoing public health emergency, and those actions were soon subject to a variety of legal challenges. This Article analyzes the Colorado Supreme Court's decisions resulting from those legal challenges. It argues that the court never sent a clear signal about how much flexibility it would give the government to meet this unprecedented crisis. Still, the court's opinions suggest that a bare majority of justices are willing to take the existence of this international public health emergency into account in their decision-making.

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INTRODUCTION

In early 2020, a mysterious respiratory illness began to pop up in Wuhan, China.[1] Within just a few months, SARS-CoV-2, the virus that causes the illness, quickly spread across the globe.[2] The resulting COVID-19 pandemic wreaked havoc everywhere—and Colorado was no exception.[3] To respond to this unprecedented public health crisis, Colorado's state

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1. WHO, *WHO Timeline – COVID-19*, WHO (Apr. 27, 2020), https://www.who.int/news/item/27-04-2020-who-timeline---covid-19.

2. *Id.*

3. *See* discussion *infra* Part I.

government took a variety of extraordinary steps, from summarily adjourning an ongoing legislative session to temporarily suspending the operation of certain state statutes.[4] These actions quickly became the subject of a series of court challenges in which a variety of groups claimed that the government had overstepped its authority in taking such extraordinary measures.[5] Inevitably, the state's highest court was called to weigh in.[6]

One might have expected that the Colorado Supreme Court would send a clear signal one way or another about its approach to these cases, either confirming that the government would be given broad latitude to address this once-in-a-century disaster or taking a firm stand against reading any flexibility into the law's mandates. But no such signal was forthcoming. For months, the court toggled between divided decisions and unanimous, per curiam opinions.[7] Still, within a relatively short time, the court appeared to settle on a message, striving to impart a "nothing to see here, folks" sense to their opinions—recognizing the existence of the pandemic but refusing to allow its decisions to be driven by it.[8] That was the ostensible message. A close reading of these opinions suggests that, at least for a majority of justices, the state constitution has more play in the joints than the court has been willing to explicitly acknowledge.[9]

One caveat before diving into the discussion: This Article certainly is not meant to be the final say on this topic. As of the date of this writing (October 2021), the pandemic rages on, and Colorado courts continue to hand down COVID-related opinions. Still, more than a year into the pandemic, it is worth taking stock of where we are now and where we might be headed.

This Article proceeds in three Parts. Part I gives a summary of the COVID-19 pandemic in Colorado, focusing primarily on the actions the state government took that were later challenged in court. Part II reviews key cases issued by the Colorado Supreme Court, dividing them into three different categories. Part III offers some observations about those cases and a few lessons from the court's decision-making thus far.

I. COVID-19 COMES TO COLORADO

Before delving into the Colorado judiciary's response to the COVID-19 pandemic, it's worth reviewing a short timeline of the key events that gave rise to the opinions discussed in Part II.

On January 9, 2020, the World Health Organization announced the existence of a mysterious coronavirus-related pneumonia popping up in

4. *See* discussion *infra* Sections II.A.i–ii.
5. *See* discussion *infra* Sections II.A.ii, II.B.
6. *See* discussion *infra* Part II.
7. *See* discussion *infra* Part II.
8. *See* discussion *infra* Part II.
9. *See* discussion *infra* Parts II & III.

Wuhan, China.[10] Just a few weeks later, the Centers for Disease Control and Prevention confirmed the first known case of the novel coronavirus in the United States.[11] The first two identified coronavirus cases in Colorado were announced on March 5, 2020.[12]

In early March, former President Trump declared a national emergency.[13] In Colorado, Governor Jared Polis quickly followed suit with his own declaration.[14] A few days later, the state announced the first COVID-19-related death in Colorado.[15] On March 16, the Chief Justice of the Colorado Supreme Court issued an order suspending many court operations, including jury trials that were not subject to imminent speedy trial deadlines.[16] At this same time—with the pandemic escalating and fear rising among the general public—political candidates and ballot-initiative proponents were required to begin collecting signatures from registered voters.[17]

To combat the ever-increasing number of COVID-19 cases, Governor Polis issued an executive order requiring Coloradans to stay home except for critical activities like obtaining food and medical care.[18] On March 30, 2020, the General Assembly summarily adjourned its regular session at the Capitol out of a concern that continuing to hold public hearings on legislation would further spread the disease.[19]

In April 2020, the state amended the Colorado Rules of Criminal Procedure to permit a court to declare a mistrial "on the ground that a fair jury pool cannot be safely assembled . . . ."[20] In May, Governor Polis issued an executive order suspending the operation of certain statutes governing the ballot initiative process and authorizing the secretary of state to create temporary rules to permit signature gathering by mail and email.[21] By

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10. WHO, *WHO Statement Regarding Cluster of Pneumonia Cases in Wuhan, China*, WHO (Jan. 9, 2020), https://www.who.int/china/news/detail/09-01-2020-who-statement-regarding-cluster-of-pneumonia-cases-in-wuhan-china.

11. CDC Newsroom, *First Travel-Related Case of 2019 Novel Coronavirus Detected in United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 21, 2020) https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html.

12. Colorado Public Radio Staff, *Two Cases of New Coronavirus Found in Colorado*, COLO. PUB. RADIO (Mar. 6, 2020), https://www.cpr.org/2020/03/05/colorado-coronavirus-case-is-states-first-positive-health-officials-say/; Colo. Exec. Order No. D 2020 003 (Mar. 11, 2020).

13. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

14. John Ingold & Jesse Paul, *Gov. Jared Polis Declares State of Emergency in Response to Coronavirus Outbreak*, COLO. SUN (Mar. 10, 2020, 9:58 AM), https://coloradosun.com/2020/03/10/colorado-state-of-emergency-coronavirus-jared-polis/.

15. Griswold v. Warren, 462 P.3d 1081, 1082 (Colo. 2020).

16. Order Regarding COVID-19 and Operation of Colorado State Courts, Colo. (Apr. 16, 2020).

17. COLO. REV. STAT. § 1-4-801(5)(a) (2021).

18. Office of Gov. Jared Polis, *Gov. Polis Announces Statewide Stay-At-Home Order, Provides Update on Colorado Response to COVID-19*, OFF. OF THE GOVERNOR (Mar. 25, 2020), https://www.colorado.gov/governor/news/gov-polis-announces-statewide-stay-home-order-provides-update-colorado-response-covid-19.

19. H. J. Res. 20-1007, 72d Gen Assemb., 2d Reg. Sess. (Colo. 2020).

20. COLO. R. CRIM. P. 24(c)(4).

21. Colo. Exec. Order No. D 2020 065 (May 15, 2020).

mid-June, known COVID-19 cases in the United States had reached 2,000,000.[22] On July 16, with mounting evidence that masks can prevent or slow the spread of the disease, Governor Polis issued another executive order requiring that all Coloradans over ten years of age wear a mask or face covering while in public.[23]

Toward the end of 2020, a light at the end of the tunnel began to appear as several pharmaceutical companies closed in on their goal to develop a safe and effective vaccine.[24] On December 11, 2020, the Food and Drug Administration granted emergency use authorization for the Pfizer-BioNTech COVID-19 vaccine.[25] Colorado received its first shipment three days later.[26] Still, COVID-related problems with the state government continued.[27] In early 2021, it became clear that Colorado's redistricting process would be hampered by a delay in the release of critical U.S. census data.[28] In response, the General Assembly—back in session after its March 2020 adjournment—introduced a bill that would give the state's independent redistricting commissions additional powers to address the delay in the release of the census data.[29]

As of the date this Article was written, Colorado and the United States have made substantial progress in fighting COVID-19.[30] But the pandemic continues to rage as the so-called "delta" variant is on the rise and vaccination rates have plateaued.[31]

II. COLORADO RESPONDS, AND THE JUDICIARY DECIDES

As discussed in Part I, in response to the deepening COVID-induced crisis across both the state and the country, Colorado's government passed laws and issued orders to respond to this unprecedented crisis. Court challenges to that response inevitably followed, and the state judiciary was

22. Bill Chappell & Rob Stein, *U.S. Hits 2 Million Coronavirus Cases As Many State See A Surge Of Patients*, NAT'L PUB. RADIO (June 10, 2020, 11:40 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/06/10/873473805/u-s-hits-2-million-coronavirus-cases-as-many-states-see-a-surge-of-patients.

23. Jim Hull, *Gov. Polis Issues Statewide Face Mask Order*, CPR NEWS (July 16, 2020), https://www.cpr.org/2020/07/16/colorado-governor-jared-polis-issues-statewide-face-mask-order/.

24. WHO, *Coronavirus Disease (COVID-19): Vaccines*, WHO (Oct. 7, 2021), https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-(covid-19)-vaccines.

25. *Comirnaty and Pfizer-BioNTech COVID-19 Vaccine*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/pfizer-biontech-covid-19-vaccine (last visited Dec. 21, 2021).

26. Jesse Paul & Seth Klamann, *"Absolutely Historic": First Doses of Pfizer's Coronavirus Vaccine Arrive in Colorado, Are Administered*, COLO. SUN (Dec. 14, 2020, 9:52 AM), https://coloradosun.com/2020/12/14/pfizer-coronavirus-vaccine-arrives-colorado/.

27. *See In re* Interrogatories on SB 21-247, 488 P.3d 1008, 1010–11 (Colo. 2021).

28. *Id.*

29. *Id.* at 1011.

30. *See How Vaccinations Are Going in Your County and State*, N.Y. TIMES (Oct. 21, 2021), https://www.nytimes.com/interactive/2020/us/covid-19-vaccine-doses.html?action=click&module=Top%20Stories&pgtype=Homepage.

31. *Id.* ("Providers are administering about 795,000 doses per day on average, including first, second and additional doses, about a 77 percent decrease from the peak of 3.38 million reported on April 13.").

forced to grapple with a series of difficult questions about the scope of the government's power during a declared disaster. This Part breaks down those court decisions into three broad categories: (1) elections and public law; (2) criminal law and the right to a speedy trial; and (3) individual rights relating to remote hearings.

A. Elections and Public Law

The Colorado Supreme Court handed down four major opinions addressing the operation of the state government during the pandemic. These four cases are probably the clearest window into the court's thinking: they outline the major themes the court had to grapple with and display the competing interests the justices had to weigh.

i. The General Assembly

The first critical case, *In re Interrogatory on House Joint Resolution 20-1006*,[32] involved the constitutional limits on the length of the Colorado General Assembly's session.[33] In the 1980s, Colorado adopted a state constitutional amendment that limited the state legislature's yearly regular session to "one hundred twenty calendar days."[34] The purpose of the amendment was to ensure that Colorado maintained its tradition of having a part-time, citizen legislature.[35] The constitution also gives the General Assembly the "power to determine the rules of its proceedings."[36] Pursuant to that authority, the legislature unanimously adopted two "Joint Rules that together implement the 120-calendar-day limit in article V, section 7 . . . ."[37] The first, Joint Rule 23(d), provides that "[t]he maximum of one hundred twenty calendar days prescribed by section 7 of article V . . . shall be deemed to be one hundred twenty *consecutive* calendar days."[38] The second, Joint Rule 44, offers an exception: session days need not be consecutive if (1) Colorado's governor has declared a state of disaster emergency; (2) the "state of disaster emergency [is] caused by a public health emergency infecting or exposing a great number of people to disease, agents, toxins, or other such threats . . .;" and (3) the governor has activated Colorado's Emergency Operations Plan.[39] Importantly, these rules were adopted long before the COVID-19 pandemic: Joint Rule 23(d) was

32. No. 20SA100, 2020 Colo. LEXIS 314 (Colo. Apr. 1, 2020).
33. *Id.* at *12.
34. COLO. CONST. art. V, § 7.
35. *In re Interrogatory on House Joint Resol. 20-1006*, 2020 Colo. LEXIS 314, at *32.
36. COLO. CONST. art. V, § 12; *see also* COLO. REV. STAT. § 2-2-404(1) (2021) ("[Each house has] the power to adopt rules or joint rules, or both, for the orderly conduct of [its] affairs . . . .").
37. *In re Interrogatory on House Joint Resol. 20-1006*, 2020 Colo. LEXIS 314, at *15
38. Colo. Leg. J. R. 23(d) (emphasis added).
39. Colo. Leg. J. R. 44(a). If those three conditions are met, "the maximum of one hundred twenty calendar days prescribed by section 7 of article V of the state constitution shall be counted as one hundred twenty separate working calendar days . . . ." *In re Interrogatory on House Joint Resol. 20-1006*, 2020 Colo. LEXIS 314, at *7.

adopted in 1983[40] and Joint Rule 44 was adopted in 2009 as a result of the H1N1 flu epidemic.[41]

In March 2020, the General Assembly adjourned its regular session in light of the COVID-19 pandemic and the concern that continuing a public legislative session posed a serious public health risk.[42] When the General Assembly adjourned, it had been in regular session for sixty-seven days and, absent the public health crisis, was scheduled to adjourn sine die on May 6, 2020.[43] The same day that it adjourned, the General Assembly also passed a joint resolution posing an interrogatory to the Colorado Supreme Court asking whether Joint Rules 23(d) and 44 were consistent with the constitution's 120-calendar-day limit.[44] The court accepted the interrogatory and immediately ordered expedited, simultaneous briefing by all interested parties.[45]

Surprising at least one observer, the supreme court's decision was not unanimous or even lopsided—the court split 4–3.[46] Writing for the majority, Justice Márquez concluded that the phrase "120 calendar days" was ambiguous on whether that time period had to be consecutive, and the General Assembly "reasonably resolved this ambiguity through its adoption of Joint Rules 23(d) and 44(g)."[47] In concluding that the legislature's rules were a reasonable way to resolve the ambiguity, Justice Márquez's opinion explicitly relies on the pandemic, noting that these rules "provid[e] crucial flexibility" during this "declared public health crisis," ensuring that "legislators do not have to choose between representing their constituents . . . and supporting their communities through the crisis at home."[48] Justice Márquez likewise noted that going forward, the pandemic "will have consequences for the state that will necessitate a legislative response;" the legislative rules "safeguard[] continuity of government at the time Coloradans need it most."[49]

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40. *In re Interrogatory on House Joint Resol. 20-1006*, 2020 Colo. LEXIS 314, at *15. The Supreme Court's opinion is also careful to note that "Joint Rule 23(d) has been readopted each year but its language has remained unchanged since 1989." *Id.* at *14.

41. *Id.* at *16.

42. *Id.* at *6–7.

43. *Id.* at *10.

44. *Id.* An interrogatory is a Colorado-specific procedural vehicle for the state's highest court to weigh in on a matter without waiting for a lawsuit to wind its way up through the judicial branch. Specifically, the state constitution says that "[t]he supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives . . . ." COLO. CONST. art. VI, § 3. Though the provision is written in the imperative, the Supreme Court long ago decided that it has discretion on whether to take up an interrogatory. *See, e.g.*, *In re* Interrogatories by the Governor, 245 P.2d 1173, 1175 (Colo. 1952).

45. *In re Interrogatory on House Joint Resol. 20-1006*, 2020 Colo. LEXIS 314, at *11–12.

46. *Id.* at *3.

47. *Id.* at *23–24.

48. *Id.* at *33.

49. *Id.* at *33–35; *see also id.* at *40 ("In order to assure the continuing vitality of our state constitution beyond an age when brittle words lose life and relevance to unforeseen problems, we must consider the object to be accomplished and the mischief to be avoided by the provision at issue.") (quoting People *in re* Y.D.M., 593 P.2d 1356, 1359 (Colo. 1979)).

Justice Samour wrote the dissent on behalf of himself, Chief Justice Coats, and Justice Boatright.[50] He argued that the 120-day calendar limit was not ambiguous and that it clearly limited the legislature to 120 *consecutive* calendar days.[51] Perhaps most critical for our purposes, Justice Samour addressed head-on the claim that the court should offer greater flexibility on legal requirements given the COVID-19 pandemic.[52] He worried that the majority opinion risks "falling prey to a slippery slope" and "opens a Pandora's Box"; recognizing that "these are unprecedented times," Justice Samour nevertheless opined that COVID-19 "cannot serve as an excuse to usurp Coloradans' exclusive right to amend their constitution."[53]

What is one to make of these dueling opinions? At first glance, they signal a critical divide within the court—not on the meaning of the term "calendar days," but about how the judiciary should react to the pandemic. Four justices appeared to be willing to give the state government some flexibility to address the unprecedented emergency; three appeared as if they would refuse even if doing so substantially burdened the state's ability to govern itself.[54] But this one opinion isn't the whole story; later decisions would complicate the emerging picture.

ii. Elections

The next significant COVID-19 case to make its way up to the Colorado Supreme Court involved the state's elections. In Colorado, if a person wishes to run for political office and put their name on the primary ballot, they can do so in one of two ways: receive at least 30% of the vote at their political party's assembly[55] or collect a certain number of signatures from registered voters by circulating a petition.[56] In 2020, Michelle Ferrigno Warren sought the Democratic nomination for the U.S. Senate seat then held by Republican Cory Gardner.[57] She chose to circulate a petition, and under state law, had fifty-seven days to collect 1,500 signatures from each of the state's seven congressional districts.[58] Unfortunately, those fifty-seven days fell between January and March 2020, and the ongoing pandemic hampered her efforts to collect the required number of signatures.[59] Her petition was unsuccessful, and she sued Colorado's secretary of state

50. *Id.* at *41 (Samour, J., dissenting).
51. *Id.* at *41–43.
52. *Id.* at *41–42.
53. *Id.* at *56.
54. *Id.* at *5.
55. COLO. REV. STAT. § 1-4-601(2)(a) (2021).
56. *Id.* § 1-4-801(2).
57. Griswold v. Warren, 462 P.3d 1081, 1082 (Colo. 2020); *see also* Justin Wingerter, *Denver Immigration Advocate Joins U.S. Senate Race*, DENVER POST (Aug. 6, 2019, 2:51 PM), https://www.denverpost.com/2019/08/06/michelle-warren-ferrigno-2020-senate-gardner/.
58. *Warren*, 462 P.3d at 1082.
59. *Id.* at 1082–83.

seeking an order that her name be placed on the ballot.[60] The district court sided with Ferrigno Warren, and the secretary of state appealed.[61]

In a significant break from its previous COVID-19 decision, the court issued a unanimous, per curiam decision in *Griswold v. Warren*.[62] Speaking with one voice, the court held that the statutory provisions requiring 1,500 valid signatures from each congressional district are not subject to a substantial compliance standard and instead impose a "minimum threshold that the legislature has declared 'must' be met for a candidate to petition onto the ballot."[63] Signaling some distance from its decision in *In re House Joint Resolution 20-1006*, the court wrote, "While we recognize that the circumstances that made signature collection more difficult this year are unprecedented, we do not have the authority to rewrite the Election Code in response to the COVID-19 virus."[64] As a result, Ferrigno Warren's name did not make it onto the ballot, and her campaign came to an end.[65]

The court handed down the *Warren* decision on May 4, 2020.[66] Another election case filed just a few days later began to percolate from the lower courts—this time about ballot initiatives.[67] The Colorado constitution reserves to the people "the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly[.]"[68] To place an initiative on the ballot, a proponent must collect a certain number of valid signatures from registered voters in the state.[69] The constitution further requires that "such petition shall be signed by registered electors *in their own proper persons only* . . . ."[70]

In March 2020, Governor Polis—relying on his powers under the Colorado Disaster Emergency Act—issued Executive Order D 2020 065, which purported to suspend the operation of certain statutes that govern the ballot initiative process and authorize the secretary of state to adopt emergency rules that permit signature gathering by mail and email, rather than continuing to require them to be collected in person.[71] A group of interested parties who claimed that the executive order was inconsistent with the state constitution quickly sued Governor Polis in his official

60. *Id.*
61. *Id.* at 1083–84. The secretary's appeal was pursuant to COLO. REV. STAT. § 1-1-113(3), another unusual procedural mechanism that gives the Supreme Court direct, discretionary review over certain election disputes. *Id.*; *see also* COLO. REV. STAT. § 1-1-113(3).
62. *Warren*, 462 P.3d at 1082.
63. *Id.* at 1085.
64. *Id.* at 1086.
65. *Id.* at 1087.
66. *Id.* at 1082.
67. Ritchie v. Polis, 467 P.3d 339, 341–42 (Colo. 2020).
68. COLO. CONST. art. V, § 1(1).
69. *Id.* § 1(2).
70. *Id.* § 1(6) (emphasis added).
71. *Ritchie*, 467 P.3d at 341.

capacity.[72] The district court denied the plaintiffs' motion for a preliminary injunction, and the plaintiffs appealed.[73]

The supreme court's decision was again unanimous and per curiam.[74] Noting that "[w]e confront here again the extraordinary impact that the COVID-19 pandemic has had on the operations of the electoral process in Colorado," the court took up the meaning of the phrase "in their own proper persons only" in the state constitution.[75] It held that the phrase derives from the Latin phrase *in propria persona*, which means "in one's own person."[76] "Read together with the second cited requirement—that a registered elector attest to the validity of the signatures—[the court concluded] that th[o]se provisions require that the personal signature occur in the presence of the person circulating the petition."[77] As a result, the court concluded that the state constitution mandates that petitions be signed in person—not remotely—and that this "requirement cannot be suspended by executive order, even during a pandemic."[78]

iii. Redistricting

The final election-related case involves Colorado's redistricting process. Under the U.S. Constitution, states must redraw the lines after each decennial census for their congressional and legislative districts to ensure compliance with the "one person, one vote" principle.[79] Historically a partisan and litigious affair,[80] redistricting underwent a significant change in Colorado with the passage of Amendments Y and Z in 2018.[81] Those two amendments established two independent redistricting commissions: one for Colorado's congressional seats and the other for its state legislative districts.[82] The commissions were designed to take partisanship out of the process—"to limit the influence of partisan politics over redistricting and make the process more transparent and inclusive."[83] Along with a host of other substantive and procedural provisions, the amendments set out a detailed timeline for the redistricting process.[84]

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72. *Id.* at 341–42.

73. *Id.* at 342; *see* COLO. APP. R. 50(a)(3). This case involves a third unusual appellate procedural mechanism: Colorado Appellate Rule 50 give the Supreme Court the power to grant *certiorari* review before the Court of Appeals issues a judgment if "the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate determination in the supreme court." COLO. APP. R. 50(a)(3); *see also* Christopher M. Jackson, *Certiorari Before Judgment: An Examination of C.A.R. 50*, COLO. LAW. (2021), at 19.

74. *Ritchie*, 467 P.3d at 341

75. *Id.* at 341–43.

76. *Id.* at 343 (citing *In Propria Persona*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

77. *Id.*

78. *Id.* at 345.

79. Salazar v. Davidson, 79 P.3d 1221, 1226 (Colo. 2003); *see e.g.*, Baker v. Carr, 369 U.S. 186 (1962).

80. *In re* Interrogatories on SB 21-247, 488 P.3d 1008, 1010 (Colo. 2021).

81. *Id.* at 1013.

82. *Id.* at 1010.

83. *Id.* at 1013.

84. *Id.* at 1014.

Trouble hit in mid-2020 when it became clear that the COVID-19 pandemic would delay the federal government's data collection and processing for that year's census.[85] The government's delay in releasing the census data made it difficult, if not impossible, for Colorado's new redistricting commissions to complete their work by the deadlines prescribed in the state constitution.[86] As a result, the state legislature began drafting Senate Bill 21-247.[87] Among other things, the bill permitted the redistricting commissions to use preliminary census data to begin their work and required any court reviewing the commissions' work to apply a "substantial compliance" standard.[88] The General Assembly then asked the Colorado Supreme Court to review the bill and determine whether it complied with the state constitution.[89]

Breaking its unanimity streak, the Colorado Supreme Court split 5-2.[90] Writing for the majority, Justice Márquez held that Amendments Y and Z "do not require the exclusive use of final census data when creating preliminary and staff plans" and that the commissions "are thus free to consult other reliable sources of population data . . . so long as the resulting final plans . . . conform with the criteria set out in [the state constitution]."[91] At the same time, the court held, "the General Assembly does not have the authority to *compel* the commissions . . . to take any action beyond what Amendments Y and Z already require[;]" it is up to the commissions, and not the General Assembly, whether to use non-final census or other reliable data.[92] Lastly, relying on the principle of separation of powers, the court determined that "the General Assembly lacks the authority to dictate the standard a court should apply when reviewing compliance with constitutional provisions . . . ."[93]

Justices Hood and Gabriel dissented in part.[94] Writing for the pair, Justice Hood argued that the General Assembly had some role in "facilitat[ing] the efforts of the redistricting commissions by addressing matters as to which Amendments Y and Z are silent" and that this role includes requiring the commissions "to look at certain high-quality federal data about who lives where while they're drawing lines around us."[95] There are two important points about this partial dissent. First, unlike the dissenters in *In re House Joint Resolution 20-1006*, Justices Hood and Gabriel would have given the legislature *more* flexibility in addressing the tardy census

85. *Id.* at 1015.
86. *Id.* at 1015–16.
87. *Id.* at 1016.
88. *Id.*
89. *Id.* Like *In re Interrogatory on House Joint Resol. 20-1006*, Supreme Court review came about through an interrogatory. *See* COLO. CONST. art. VI, § 3.
90. *In re* Interrogatory on House Joint Resol. 20-1006, No. 20SA100, 2020 Colo. LEXIS 314, at *1 (Colo. Apr. 1, 2020).
91. *In re Interrogatories on SB 21-247*, 488 P.3d at 1018.
92. *Id.* (emphasis added).
93. *Id.*
94. *Id.* at 1023.
95. *Id.* at 1023, 1025 (Hood, J., dissenting).

data, not less.[96] Second and relatedly, while Justices Hood and Gabriel did not sign on to the majority opinion, they did not dispute the validity of the ultimate result—that the redistricting commissions have the flexibility to consider other data to avoid an irreconcilable conflict between constitutionally imposed deadlines and the delay in final U.S. census data.[97]

B. Criminal Law and the Right to a Speedy Trial

Colorado courts were also called to address a myriad of issues relating to criminal prosecution during the pandemic. The most pressing issue has been a criminal defendant's right to a speedy trial.

Colorado has adopted a speedy trial statute[98] which "is intended to safeguard a defendant's constitutional right to a speedy trial."[99] The law provides that a criminal defendant must be brought to trial "within six months from the date of the entry of a plea of not guilty."[100] If that does not happen, the "pending charges shall be dismissed" and the defendant cannot be tried again for the same offense.[101] But the law also contains certain exceptions, ways that courts or the parties can extend that six-month deadline. Among others, these include if a party requests a continuance, if the defendant fails to appear on the trial date, or if the court declares a mistrial.[102]

The COVID-19 pandemic "wreaked havoc" on Colorado's criminal justice system, and "trial courts have struggled with effectuating a defendant's statutory right to speedy trial amid this unparalleled public health crisis."[103] To at least partially address this concern, in April 2020 the supreme court adopted an amendment to a criminal procedure rule relating to the jury pool.[104] Rule 24 now provides that the trial court may declare a mistrial if "a fair jury pool cannot be safely assembled in that particular case due to a public health crisis or limitations brought about by such crisis."[105] Over the ensuing months, the court was repeatedly called on to address speedy trial issues resulting from the pandemic.[106]

The first opinion on this topic was *People v. Lucy*.[107] In this consolidated appeal, two defendants were separately charged with

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96. *Id.* at 1025–26.
97. *Id.* at 1023.
98. COLO. REV. STAT. § 18-1-405 (2021).
99. People v. Nunez, 486 P.3d 1149, 1152 (Colo. 2021).
100. COLO. REV. STAT. § 18-1-405(1).
101. *Id.*
102. *Id.* § 18-1-405(3)–(4), (6).
103. People v. Lucy, 467 P.3d 332, 334 (Colo. 2020).
104. *Id.* at 337 n.3.
105. COLO. R. CRIM. P. 24(c)(4).
106. *See Lucy*, 467 P.3d at 334 (addressing whether trial courts may grant continuances with a tolling of the statutory speedy trial periods due to the pandemic); *In re* People v. Nunez, 486 P.3d 1149, 1151 (Colo. 2021) (addressing whether a court can declare a retroactive mistrial after Colorado's statutorily established speedy trial deadline passed); *In re* People v. Sherwood, 489 P.3d 1233, 1236 (Colo. 2021) (addressing how to calculate new speedy trial deadlines after a mistrial).
107. 467 P.3d 332 (Colo. 2020).

misdemeanors.[108] In both, the prosecution filed a motion to continue the trial and requested that the court toll the speedy trial period in light of the pandemic and the difficulty of safely assembling a jury pool.[109] The Colorado Supreme Court took up the case[110] "hoping to provide guidance on whether a trial court may grant the prosecution's contested request for a continuance with a tolling of the statutory speedy trial period based on a public health crisis like the COVID-19 pandemic."[111] Writing for a unanimous court, Justice Samour recognized the "havoc" caused by the pandemic and noted that "[t]he criminal justice system has not been spared from the ravages of this malady."[112] Things had gotten so bad in that judicial district that the trial court did not rule on the prosecution's motions to continue "because there was no way to safely hold an earlier hearing that would permit an objection [from a defendant] to be lodged in person."[113] And, in fact, the supreme court relied on this emergency to justify its decision to consider the interlocutory appeal, noting that "[t]he urgency to have our court resolve the question today cannot be overstated."[114] Nevertheless, the court's analysis of the defendants' speedy trial rights made no allowance for the "unprecedented public health crisis."[115] The court reviewed Colorado's speedy trial statute and concluded that the type of continuance contemplated by the statute includes "a public health crisis such as the COVID-19 pandemic" if the prosecution can establish, in each individual case, that (1) material evidence is unavailable as a result of the pandemic, (2) the prosecution exercised due diligence to obtain that evidence, and (3) the court has reasonable grounds to believe the unavailable evidence will be available on the new trial date.[116] The court closed its opinion by recognizing that "we find ourselves living in an almost unrecognizable new world . . . ." that has "made it virtually impossible to hold jury trials in criminal cases" and "unfairly placed our trial courts in a catch-22."[117] But driving home its refusal to bend the rules, the court noted, "Yet, defendants continue to have a statutory right to speedy trial under [the Colorado statute]."[118]

Lucy is significant for a few reasons. To begin with, the court repeatedly invoked the "urgency" of the pandemic, but it made no suggestion that its opinion was influenced by the pandemic.[119] The opinion's conclusion that trial courts must make a "case-by-case" determination on whether

108. *Id.* at 334.
109. *Id.*
110. *Id.* The appeal was heard pursuant to the Supreme Court's original jurisdiction under COLO. APP. R. 21. *Id.* at 335.
111. *Id.* at 334.
112. *Id.*
113. *Id.* at 335.
114. *Id.* at 336.
115. *Id.* at 336–38.
116. *Id.* at 337.
117. *Id.* at 339.
118. *Id.*
119. *Id.* at 336.

a mistrial is proper[120] is particularly striking: that kind of detailed argumentation is a tall order for prosecutors and defense attorneys who are already burdened with high caseloads.[121] The court, in other words, offered plenty of sympathy but no legal relief. But there may be another factor that explains the court's rigid stance. While the government undeniably has a significant interest in postponing criminal cases during a pandemic, there is a countervailing right at play—the criminal defendant's constitutional right to a speedy trial.[122] Unlike *In re House Joint Resolution 20-1006* or *Warren*, a decision giving the government greater latitude would come at the expense of an individual right.[123]

In the second case, *In re People v. Nunez*,[124] the supreme court considered a case where the trial court retroactively declared a mistrial, issuing its order *after* the defendant's speedy trial deadline had lapsed.[125] Trial had been set for a date within the deadline, but in the interim the chief judge of the judicial district issued an order canceling all jury trials in light of the pandemic.[126] At a hearing, the prosecution moved for a continuance under the amended Rule of Criminal Procedure 24(c)(4), but the court did not rule on the motion.[127] Later, the defendant filed a motion to dismiss arguing that his speedy trial deadline had passed.[128] The court denied the motion and the defendant appealed.[129] Though the Colorado Supreme Court recognized COVID-19's impact on the state judicial system, it held firm to the express requirements imposed by Colorado statute and Rule 24: "A court may not declare a retroactive mistrial in order to get around the mandatory deadlines set by Colorado's speedy trial statute."[130] The Colorado Supreme Court's decision, while unanimous, was not per curiam.[131]

The third and final case is *In re People v. Sherwood*.[132] There, the court was called on to interpret Rule 24(c)(4), and in particular to decide whether a mistrial declared pursuant to that rule extends or tolls the speedy trial period.[133] Writing for a unanimous court, Justice Samour held "that a

120. *Id.* at 338.

121. *See* William D. Hauptman & Kendra N. Beckwith, *The Duty of Competence in the New Normal*, COLO. LAW., (2021), at 43.

122. U.S. CONST. amend. VI; COLO. CONST. art. II, § 16.

123. *Compare supra* notes 32–49 and accompanying text (recognizing the Court's willingness to interpret flexibility in the General Assembly rules due to the pandemic), *and supra* notes 62–65 and accompanying text (acknowledging the Court's unwillingness to rewrite the Election Code despite the challenges of collecting signatures during the pandemic), *with supra* notes 118–22 and accompanying text (demonstrating the Court's refusal to make exceptions to laws that protect constitutional rights).

124. 486 P.3d 1149 (Colo. 2021).

125. *Id.* at 1150.

126. *Id.*

127. *Id.* at 1151.

128. *Id.*

129. *Id.* The defendant appealed directly to the Supreme Court under Colorado Appellate Rule 21, which gives the court original jurisdiction in extraordinary cases. COLO. APP. R. 21(a)(1).

130. *Nunez*, 468 P.3d at 1152–53.

131. *Id.* at 1149.

132. 489 P.3d 1233 (Colo. 2021).

133. *Id.* at 1236.

mistrial triggers a tolling, not an extension, of the speedy trial period[,]" and that the amended version of Rule 24 only excludes time from the speedy trial deadline that is "(1) reasonable, (2) attributable to the mistrial, and (3) not in excess of three months."[134] This relatively simple, straightforward opinion recognized the existence of the pandemic, but again made no suggestion that the court's decision was influenced in any way by it.[135]

C. Individual Rights Relating to Remote Hearings

The last major subject that Colorado courts have addressed concerns the right to attend remote hearings. With in-person encounters carrying the significant risk of expanding the disease, courts turned to remote audio–video platforms.[136] But are these legal proceedings consistent with the parties' rights to due process of law? As of the date this Article was drafted, there are only two opinions on this issue that are worth noting. In *People ex rel. R.J.B*,[137] the Colorado Court of Appeals considered whether a court violated a mother's due process rights by holding a termination of parental rights hearing via WebEx, an online video platform.[138] The intermediate appellate court said it did not, concluding that the mother was given "fundamentally fair procedures" because she had notice of the hearing, was represented by court-appointed counsel, and was given a meaningful opportunity to participate in the hearing.[139] And while the Court of Appeals's opinion recognized the existence of the COVID-19 pandemic,[140] its review of the mother's due process and equal protection claims did not reference the pandemic.[141]

A few months later, the Colorado Supreme Court took up another case challenging the use of a videoconference platform, this time in the context of a criminal prosecution. In *People v. Hernandez*,[142] the trial court held a hearing on the defendant's pretrial motion for immunity under Colorado's "make my day" law.[143] The prosecution moved to hold the hearing via WebEx and the defendant opposed.[144] The trial court granted the motion but ordered the defendant to appear in person because he objected to the remote platform.[145] On appellate review, the defendant argued that the hearing violated his Confrontation Clause rights, contending that the witnesses called against him must be *physically* present.[146] The Supreme

134. *Id.* at 1236, 1239.
135. *Id.* at 1236. (noting only that the pandemic was the reason for the amendments to Rule 24).
136. Douglas Keith & Alicia Bannon, *Principles for Continued Use of Remote Court Proceedings*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), https://www.brennancenter.org/our-work/research-reports/principles-continued-use-remote-court-proceedings.
137. 482 P.3d 519 (Colo. App. 2021).
138. *Id.* at 522.
139. *Id.* at 524–25.
140. *Id.* at 522.
141. *Id.* at 524–25.
142. 488 P.3d 1055 (Colo. 2021).
143. *Id.* at 1058–59 (citing COLO. REV. STAT. § 18-1-704.5).
144. *Id.* at 1059.
145. *Id.*
146. *Id.* at 1060.

Court disagreed. Relying primarily on U.S. Supreme Court precedent, the Colorado high court held that "[w]hile physical presence generally includes the right to confront a witness face-to-face at trial, . . . this right is not absolute."[147] Expressly relying on the trial court's findings regarding the "very high COVID-19 incident rate" in the judicial district and that "requiring witnesses to appear in person presented a risk of contagion[,]"[148] the Colorado Supreme Court concluded that the trial court's order did not violate the defendant's rights.[149] Notably, neither the parties nor the court addressed any argument relating to the defendant's due process rights.

III. LESSONS

What can we glean from the decisions discussed above? With such a small data set—fewer than a dozen opinions—it is difficult to draw definitive conclusions about how much of the Colorado Supreme Court's decision-making has been influenced by the exigencies of this ongoing crisis. Still, I want to offer a working thesis that attempts to synthesize these opinions into a coherent whole.

The thesis is this: Rhetorically speaking, the court refuses to give an inch. The law is the law, and *fiat justitia ruat caelum*—let justice be done though the heavens fall.[150] Any exception to a legal requirement due to a public health crisis must have been adopted beforehand; the court will not invent new exceptions on the fly. But underneath that hardline stance, a majority of the court does not actually think that the state constitution is a suicide pact.[151] The letter of the law must be followed, even if it's painful (*Warren*), and perhaps especially so when countervailing individual rights are in play (*Lucy*).[152] But the government cannot be left without recourse; the court will, at a minimum, ensure there is a mechanism to change the legal rules that need to be changed to keep the government functioning (*In re House Joint Resolution 20-1006*).[153]

At the same time, at least two current justices would take the hardline approach and stick to their interpretation of the law, even in cases where that interpretation makes it difficult for the state to adapt to the pandemic

147. *Id.* at 1060–61.
148. *Id.* at 1062.
149. *Id.*
150. Starski v. Kirzhnev, 682 F.3d 51, 56 (1st Cir. 2012) (emphasis added).
151. *E.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("[F]or while the Constitution protects against invasions of individual rights, it is not a suicide pact."); *see also* President Abraham Lincoln, July 4th Message to Congress (July 4, 1861) (transcript available at https://millercenter.org/the-presidency/presidential-speeches/july-4-1861-july-4th-message-congress) ("To state the question more directly, Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?").
152. Griswold v. Warren, 462 P.3d 1081,1086 (Colo. 2020); People v. Lucy, 467 P.3d 332, 339 (Colo. 2020).
153. *In re Interrogatory on House Joint Resol. 20-1006*, No. 20SA100, 2020 Colo. LEXIS 314, at *17–18 (Colo. Apr. 1, 2020).

or where there are good faith disagreements on the legal merits.[154] Justices Boatright and Samour, who dissented in *In re Interrogatory House Joint Resolution 20-1006*, made their position clear when they wrote, "[T]hese challenging times only heighten the need for our leaders to show discipline by adhering to the constitution . . . . [E]ven in the face of heavy criticism, we all must react within the bounds of the constitution."[155] (The third justice who joined that dissent, Chief Justice Coats, has since retired and been replaced by Justice Berkenkotter).[156]

One important caveat is that the cases analyzed in this Article do not always present tough calls. In many, the "right" legal answer is arguably quite clear, and that answer does not present significant problems for the state government (*Lucy*, *Sherwood*, *Nunez*).[157] The court has not yet been presented with a truly intractable case—where the plainly correct legal answer would lead to a truly untenable result and leave the government impotent to respond to the major crisis.[158] And with the pandemic potentially beginning to recede, we may never know how the court would respond—at least until the next crisis hits.

CONCLUSION

The COVID-19 pandemic isn't over, and we can expect that the Colorado Supreme Court will continue to issue groundbreaking decisions on the state's response to this international emergency. As new cases come up for the court's review, we should be cognizant of the issue lurking in the background: whether and to what extent the judiciary should give the political branches more breathing room to tackle this global crisis. My hope is that this Article has offered at least some insight into the ways the court has approached this issue in the past and how it might approach cases going forward.

154. *Id.* at *56 (Samour, J., dissenting).
155. *Id.* at *56–57.
156. Press Release, Governor Jared Polis, Governor Polis Appoints Colorado Supreme Court Justice (Nov. 20, 2020).
157. *Lucy*, 467 P.3d at 338; *In re* People v. Sherwood, 489 P.3d 1233, 1239 (Colo. 2021); *In re* People v. Nunez, 486 P.3d 1149, 1152 (Colo. 2021).
158. *Contra Lucy*, 467 P.3d at 338; *Sherwood*, 489 P.3d at 1239; *Nunez*, 486 P.3d at 1152.